to escape liability, prove that its engine was equipped with the best mechanical appliances to prevent the escape of sparks, that the engine was kept in proper condition and was properly managed, and that the right of way was clear of combustible material.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1714; Dec. Dig. § 480.* 6 Va.-W. Va. Enc. Dig. 133; 10 Id. 417.]

3. Railroads (§ 482*)—Fires—Evidence.—Where the evidence showed that a fire originated about the time a local freight passed; that the spark arrester on the engine was out of repair; that the engine threw sparks in unusual quantities about the time the fire originated; that the fire began on the right of way; that the train was behind time, running greatly in excess of its schedule rate, through a heavily wooded country, in a very dry season and on a windy day—the jury were warranted in finding a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.* 6 Va.-W. Va. Enc. Dig. 135, et seq.; 5 Id. 305; 10 Id. 417.]

4. Appeal and Error (§ 997*)—Judgment Sustaining Demurrer to Evidence—Review.—Where the jury would have been warranted in finding for plaintiff, the court on writ of error to review a judgment sustaining the demurrer to the evidence and dismissing the case must find for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 997.* 4 Va.-W. Va. Enc. Dig. 540, et seq.]

McCROREY *v.* THOMAS.

March 11, 1909.

[63 S. E. 1011.]

1. Exceptions, Bill of (§ 26*)—Construction.—A statement in a bill of exceptions that a physician testifying for plaintiff referred to the case of a man with a depressed fracture of the skull, and, on stating that the injury was occasioned by a blow on the head, he was asked how, and answered that he was struck with a piece of iron rod, and that defendant's counsel objected to this last question, and it was overruled, does not show that it was objected that the witness had no right to give the result of an isolated case, which came under his observation.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 26.* 5 Va.-W. Va. Enc. Dig. 375, 376.]

2. Appeal and Error (§ 232*)—Objection Not Made Below—Admissibility of Evidence.—A party will not be permitted to make one

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

objection to evidence in the trial court and another in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232;* Trial, Cent. Dig. §§ 211-222, 691-693. 1 Va.-W. Va. Enc. Dig. 560.]

3. Trial (§ 191*)—Falling Awning—Action for Injuries—Instructions—Assumption of Fact.—In an action for personal injuries caused by being struck by an awning in front of defendant's store, which fell on plaintiff on a windy day, the court charged that, if the wind was "dangerously high," it was defendant's duty to raise the awning, if he knew, or could have known by the exercise of ordinary care, that such a wind was blowing, and the giving of such instruction and the refusing of an instruction amending the same by leaving out the word "dangerously" was assigned as error, as assuming that the wind was "dangerously high." Held, that neither the instruction as given, nor as rejected, assumed that the wind was of the character described in either.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.* 7 Va.-W. Va. Enc. Dig. 730, et seq.]

4. Appeal and Error (§ 1033*)—Harmless Error—Instructions.—The instruction given required a higher wind to call on defendant to raise the awning than the charge requested, and was therefore more favorable to defendant, and, if error, harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4056-4058; Dec. Dig. § 1033.* 1 Va.-W. Va. Enc. Dig. 601.]

5. Municipal Corporations (§ 809*)—Awning Over Sidewalk—Care Required of Storekeeper.—In erecting and maintaining an awning over a sidewalk, a storekeeper is bound to exercise ordinary care to see that it is so secured and managed as to withstand not only ordinary vicissitudes of the weather, but the force of winds liable to occur in the locality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.* 12 Va.-W. Va. Enc. Dig. 912.]

6. Municipal Corporations (§ 808*)—Awning Over Sidewalk—Injury to Pedestrian—Persons Liable.—Whether an awning over a sidewalk, which fell and injured a pedestrian, was erected under the supervision of the owner or an independent contractor, is wholly immaterial as to the liability of the owner, unless injury was caused before the contractor completed the work and turned it over to the owner.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 808.* 7 Va.-W. Va. Enc. Dig. 366, et seq.]

7. Negligence (§ 55*)—Persons Liable—Independent Contractor.—An independent contractor is not liable for injury to the person or

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

property of one not a party to the contract, occurring after he has completed and turned it over to the owner or employer and it has been accepted by him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 68; Dec. Dig. § 55.* 7 Va.-W. Va. Enc. Dig. 363, et seq.; 10 Id. 363.]

8. Negligence (§ 121*)—Presumption from Injury.—While negligence is never presumed from the mere fact of injury, yet where defendant owes to plaintiff a duty to use care, and the thing causing the injury was under the management of defendant or his employees, and the accident is such as ordinarily does not occur when proper care is taken, a presumption of negligence is warranted.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 218; Dec. Dig. § 121.* 10 Va.-W. Va. Enc. Dig. 402-5, et seq.]

9. Municipal Corporations (§ 817*)—Falling Awning—Injury to Pedestrian—Presumption of Negligence—Burden of Proof.—Where a pedestrian on a highway is injured by the fall of an awning attached to a building, and it is not claimed to be a nuisance, the injury warrants the presumption of negligence, which puts the burden on defendant to disprove it by evidence of employment of proper and reasonable care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1725; Dec. Dig. § 817.* 10 Va.-W. Va. Enc. Dig. 403, et seq.]

10. Appeal and Error (§ 1004*)—Excessive Damages—Questions for Jury.—Unless the damages allowed for a negligent injury are so large as to indicate that the jury was actuated by partiality or prejudice, the verdict cannot be set aside as excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.* 4 Va.-W. Va. Enc. Dig. 202, et seq.]

METROPOLITAN LIFE INS. CO. *v.* DE VAULT'S ADM'X.

March 11, 1909.

[63 S. E. 982.]

1. Insurance (§ 646*)—Action—Burden of Proof—Misrepresentation.—In an action on a policy of life insurance, the burden is on defendant to show the materiality and fraudulent intent of misrepresentations relied on to avoid the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1653; Dec. Dig. § 646.* 7 Va.-W. Va. Enc. Dig. 801; 9 Id. 351.]

2. Insurance (§ 665*)—Actions—Weight of Evidence—Suicide.—To establish the defense of suicide to avoid a life policy, the evidence where circumstantial must exclude every hypothesis of accidental death.

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.